# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1895.

## No. 897.

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THE UNITED STATES, APPELLANT,

vs.

FREDERICK S. PASSAVANT ET AL., COMPOSING THE FIRM OF PASSAVANT & CO.

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ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 United States circuit court of appeals for the second circuit.

THE UNITED STATES, APPELLANT,
*vs.*
FREDERICK S. PASSAVANT, KARL KOTZENBERG, Willian Sandhagen, Heinrich Meyer, Arthur W. Watson, & Oscar Passavant, composing the firm of Passavant & Co., appellees. } Suit No. 1082.

*Certificate for instructions.*

*To the Supreme Court of the United States:*

A judgment or decree of the circuit court of the United States for the southern district of New York having been made and entered on the 30th day of January, 1895, by which it was ordered, adjudged, and decreed that there is no error in certain proceedings before the Board of United States General Appraisers in this cause, and that their decision therein be, and the same hereby is, in all things affirmed; and an appeal having been taken from said judgment or decree to this court by the above-named appellants, and the cause having come on for hearing and argument in this court, certain questions of law arose concerning which this court desires the instructions of the Supreme Court of the United States for the proper decision of said cause.

2 The facts from which said questions arise are herewith submitted and certified as follows:

1. Certain merchandise, consisting of cotton velvets, was imported from the Empire of Germany into the port of New York by the appellees in various steamers between May 22, 1891, and March 13, 1892, and was entered at the custom-house and appraised by the appraiser.

2. The merchandise was originally imported into Germany in the gray, and was subjected to processes of dyeing and finishing, and was put in bond in that country.

3. The collector classified the merchandise for duty under paragraph 350 of the tariff act of October 1, 1890, at 20 per centum ad valorem and 14 cents per square yard, and assessed the said rates of duty upon the dutiable value of the merchandise decided by the appraiser and reported by him to the collector.

4. The merchandise was of a description provided for eo nomine in said paragraph 350, and was properly classified for duty under that section.

5. The invoices stated certain prices as the net invoice value of this merchandise. The invoices stated also certain additional sums, under the heading "German duty."

6. This German duty is a tax which is imposed by the German Government on the merchandise when it is sold by the manufacturers thereof for consumption or sale in the markets of Germany, but when the merchandise is purchased in bond, or consigned while in bond, for exportation to a foreign country, this duty is remitted by the German Government, and is called "bonification of tax," as distinguished from being refunded as a rebate.

3 7. This German duty or tax is the amount of the duty levied by the German tariff upon the goods when consumed in Ger-

many. It is collected when the finished product goes into consumption in Germany, but is remitted when the finished product is sold in bond for exportation.

8. The merchandise can be purchased in bond for exportation in the principal markets of Germany at the net invoice prices and without paying the so-called German duty. The merchandise involved in this action was so purchased for exportation.

9. In estimating and appraising the actual market value and wholesale price of such merchandise at the time of exportation to the United States in the principal markets of the country from whence imported, the appraiser decided that the dutiable value of such merchandise equalled the sum of the net invoice value and the German duty added together, and reported to the collector this decision as to the dutiable value of the merchandise appraised.

10. In estimating this dutiable value the local appraiser added as an element of dutiable value to the net invoice value these amounts specified in the invoices and entries under the name of "German duty." Such amounts had been included by the importers in their entries under duress, to avoid threatened penalties under the law.

11. The importers did not call for any reappraisement of the merchandise, but within ten days after the liquidation by the collector of each entry, and the assessment by him of the rates of duty aforesaid upon the dutiable valuation so reported to him by the appraiser, filed protests under section 14 of the act of June 10, 1890, against the decisions of the collector, of which the following protest is one, to which the others are similar:

318 & 320 CHURCH STREET, NEW YORK,
*July 16, 1892.*

4 Hon. J. B. ERHARDT,
*Collector of Customs.*

SIR: We hereby protest against your decision, liquidation, and assessment of duty at all excess above the rate of 40 per centum ad valorem, and against assessment of duty upon any greater value than marks 24,591.30 and charges on our importation of cotton velvets per "Italia;" entered May 21, 1891; entry No. 80078; entry liquidated June 27, 1891; bond No. 20433.

We further notify you that we are dissatisfied with your decision as to the rate and amount of duty exacted on the entry above referred to, and the assessment of additional duty thereon, and the reasons of our objections thereto are:

1st. That the assistant appraiser and the appraiser in advancing the value of said cotton velvets by the addition of a sum representing a duty to which said goods would have been subjected by the Government of the country of exportation if entered for consumption in said country did not act in accordance with their own judgment, but upon the suggestion of officials of the Treasury Department and without regard to the evidence presented to them.

2nd. That the reappraising officer in advancing the value of said goods beyond the invoice value also disregarded the evidence presented as to

the actual wholesale price and actual market value, and returned said goods at a valuation in excess of said actual market value and wholesale price.

3rd. That as a matter of fact the duty imposed upon goods entering into consumption in the country of exportation did not accrue and could not be imposed upon our said importation herein described under the laws of the country of exportation, because the said goods did not enter into consumption in said country, and it was therefore no part of the wholesale price or foreign market value of said goods at the place and at the time of their shipment to the United States, and duty should not therefore have been imposed by you upon any greater sum than that stated in the invoice and in our entry of said goods based thereon.

* * * * * * *

We pay said duties under compulsion and to obtain possession of our goods, and claim refund of the sum exacted in excess of the duty legally accruing.

Respectfully, PASSAVANT & CO.

*To the Board of General Appraisers:*

You are hereby notified that we are prepared to sustain by proof our contention as to the matters of fact alleged in the foregoing protest, and will present to you evidence thereon at such time and place as you may designate, reasonable notice of such designation being given to Passavant & Co., 318–320 Church st., N. Y. City.

12. The Board of United States General Appraisers, acting upon said protests, reversed the decisions of the collector on the ground that the so-called German duty was not a lawful element of dutiable value.

13. Thereupon the collector applied to the circuit court of the United States for the southern district of New York by petition praying for review of said decisions by the Board, pursuant to section 15 of the act of June 10, 1890, and the said circuit court upon said petition ordered the Board of United States General Appraisers to return to the circuit court the record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decision thereon, and the said Board of General Appraisers thereafter made such return; and the circuit court affirmed the decision of the Board as aforesaid.

14. It is admitted that Frederick S. Passavant, Karl Kotzenberg, William Sandhagen, Heinrich Meyer, Arthur W. Watson, & Oscar Passavant, the importers, are the persons composing the firm of Passavant & Company.

Upon the foregoing facts this court, for the proper decision of said cause, desires instruction upon the questions of law following:

(1) In proceedings brought before the Board of General Appraisers by protests, under section fourteen (14) of the act of June 10th, 1890, to review the collector's decisions upon the entries in this case, had the Board jurisdiction to enquire into and impeach the dutiable valuation so reported to the collector by the appraiser, as above stated, and upon which the collector assessed the rate of duty to which the merchandise was lawfully subject?

(2) If the first question is answered in the affirmative, was the "German duty" lawfully included by the appraiser in his estimate of dutiable value?

WM. J. WALLACE.
E. H. LACOMBE.
N. SHIPMAN.

6 (Indorsed:) "A." Suit No. 1082. U. S. circuit court of appeals for the second circuit. The United States, appellant, vs. Frederick S. Passavant et. al., appellees. Certificate for instructions. Wallace Macfarlane, United States attorney, attorney for collector. United States circuit court of appeals, second circuit. Filed Feb. 7, 1896. James C. Reed, clerk.

7 UNITED STATES OF AMERICA,
*Second Circuit, ss:*

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the cause entitled The United States, appellant, vs. Frederick S. Passavant, Karl Kotzenberg, William Sandhagen, Heinrich Meyer, Arthur W. Watson, & Oscar Passavant, composing the firm of Passavant & Co., appellees (suit No. 1082), was duly filed and entered of record in my office by order of said court on the 7th day of February, 1896, and as directed by said court the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, at the city of New York, in the southern district of the State of New York, this 10th day of February, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States the one hundred and twentieth.

[SEAL.] JAMES C. REED,
*Clerk United States Circuit Court of Appeals for the Second Circuit.*

Indorsement on cover: Case No. 16187. Term No., 897. The United States, appellant vs. Frederick S. Passavant et al., composing the firm of Passavant & Company. (Certificate.) U. S. circuit court of appeals, second circuit. Filed February 12th, 1896.

# In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT, v. PASSAVANT & CO. } No. 129.

## BRIEF FOR THE UNITED STATES.

### STATEMENT.

This case comes into this court on a certificate for instructions from the circuit court of appeals for the second circuit. The facts set forth in the record are as follows:

The appellees imported certain cotton velvets into New York. These velvets were originally imported into Germany in the gray, and there dyed and finished and put in bond. The invoice stated certain prices as the net invoice value of the goods, and also stated certain additional amounts, under the heading "German duty." These additional amounts were included by the importers under duress to avoid threatened penalties under the law.

This "German duty" is a tax imposed by the German Government on the merchandise when it is sold by

the manufacturers "for consumption *or sale* in the markets of Germany" (Record, finding 5), but when purchased in bond, or consigned while in bond, for exportation, the duty is remitted, this being called "bonification of tax," as distinguished from being refunded as a rebate. The goods can be bought in bond for exportation in the principal markets of Germany at the net invoice prices and without paying the duty, and these goods were so bought.

In estimating and appraising the actual market value and wholesale price of the merchandise at the time of exportation in the principal markets of Germany, the appraiser decided that the dutiable value of the merchandise equaled the sum of the net invoice value and the German duty added together; in other words, the appraiser added as an element of dutiable value to the net invoice value the amounts entered on the invoice as German duty.

The appraiser reported to the collector the dutiable value of the merchandise as ascertained by him. The importers did not call for a reappraisement under section 13 of the customs administrative act, passed June 10, 1890, and the collector properly classified the merchandise for duty, and assessed the lawful rates of duty upon the valuation ascertained by the appraiser and reported to him. Within ten days after the liquidation by the collector of the entries, the importers filed their protest under section 14 of the act mentioned against the decision of the collector, on the grounds:

> 1. The appraiser, in advancing the value of the cotton velvets by the addition of the German duty,

did not act in accordance with his own judgment, but upon the suggestion of officials of the Treasury Department, and without regard to the evidence presented.

2. The reappraiser, in advancing the goods beyond the invoice value, disregarded the evidence as to the actual wholesale price and actual market value, and returned the goods at a valuation in excess of the actual market value and wholesale price.

3. The German duty, imposed only upon goods entering into consumption, could not be imposed upon these goods, which were exported and never entered into consumption. It was, therefore, no part of the wholesale price or foreign market value of the goods.

The Board of General Appraisers, acting upon the protest, reversed the decisions of the collector on the ground that the German duty was not a lawful element of dutiable value. The collector applied to the circuit court for a review of the decision of the board, and the circuit court, after requiring the Board of General Appraisers to return the record and evidence, together with a statement of the facts, affirmed the decision of the board. Upon these facts the circuit court of appeals desires instructions upon the following questions of law:

1. In proceedings brought before the Board of General Appraisers by protest, under section 14 of the act of June 10, 1890, to review the collector's decisions upon the entries in this case, had the board jurisdiction to inquire into and impeach the dutiable valuation so reported to the collector by the appraiser, as above stated, and upon which the collector assessed the rate of duty to which the merchandise was lawfully subject?

2. If the first question is answered in the affirmative, was the "German duty" lawfully included by the appraiser in his estimate of dutiable value?

**ARGUMENT.**

I.

The remedy by protest under section 14 of the customs administrative act does not lie in this case.

It is conceded the collector properly classified the merchandise;

It is admitted the collector assessed the rates of duty to which the merchandise was lawfully subject;

No dutiable costs and charges were added or imposed;

Nor were any fees or exactions of any sort whatever;

There is no attempt, therefore, to review the decision of the collector "as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage)," which alone is reviewable by protest under section 14 of the act of June 10, 1890.

The whole matter resolves itself into an attempt to impeach and review in court an appraisement on the ground that an illegal element of value was considered and included by the appraiser. This can not be done. A court can not inquire into the mental processes of appraisers. The remedy is by reappraisement under section 13.

The Board of General Appraisers has no power under section 14 to review the action of the appraiser in ascertaining the dutiable value of the merchandise reported

to the collector. Its authority is limited to a review of the decision of the collector as to the rate and amount of duties chargeable upon the imported goods, including all dutiable costs and charges, and as to all fees and exactions of whatever character. The scheme of appraisement of merchandise and liquidation of duties and review of the action of customs officers, marked out by the act of June 10, 1890, is as follows:

The importer makes the entry and files his declaration as to the value of the goods (section 5). The appraiser ascertains the actual market value and wholesale price of the merchandise in the principal markets of the country whence imported (section 10). This the appraiser reports to the collector (section 13). If objected to, a reappraisement may be obtained, first by a general appraiser, and then by the Board of General Appraisers (section 13). If not objected to, or after reappraisement, it becomes the duty of the collector to ascertain, fix, and liquidate the rate and amount of duties to be paid on the merchandise, and the dutiable costs and charges thereon, according to law (section 13). If the importer is dissatisfied with the decision of the collector as to the rate and amount of duty, or the dutiable costs and charges, or the fees and exactions, he may protest, and the action of the collector comes for review before the Board of General Appraisers (section 14). From this board an appeal lies to the circuit court for the purpose of obtaining a construction of the law and the facts respecting the classification of the merchandise and the rate of duty imposed thereon under such classification (section 15).

The appraiser ascertains the value of the merchandise. His decision as to its dutiable value is final and conclusive unless a reappraisement is obtained under section 13, in which event the reappraisement made, ultimately, by the Board of General Appraisers becomes absolutely final and conclusive as to the dutiable value of the merchandise. The design of the law is to provide a summary method of ascertaining the dutiable value of imported goods by intrusting its final and conclusive determination to certain customs officers. This is in line with the policy pursued in matters of assessment for purposes of taxation generally. The ascertainment of questions of fact is intrusted to the customs officers, while a method is presented for reviewing in a court questions of law arising out of the application of the customs statutes to the facts as found by the appraisers. A reference to certain pertinent sections of the customs administrative act may be of service to the court.

STATUTES.

Where the imported merchandise has been actually purchased, the owner is required to declare—

> that the invoice and entry which I now produce contain a just and faithful account of the actual cost of the said goods, wares, and merchandise, and include and specify the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind, and all other costs, charges, and expenses incident to placing said goods, wares, and merchandise in condition packed ready for shipment to the United States, and no other discount, drawback, or bounty but such as has been actually allowed on the same. (Sec. 5, act June 10, 1890.)

It will be observed that the statement made by the importer of the actual cost of the merchandise is required to include and specify the value of all coverings and all other costs and charges incident to placing the goods in condition packed for shipment to the United States. The coverings and all other expenses incident to placing the goods in condition for shipment are treated as a part of the value of the merchandise subsequently to be appraised.

More explicit, in its definition of actual market value, is the declaration of the manufacturer or owner where the merchandise has not been actually purchased—

> that the said goods, wares, and merchandise were not actually bought by me, or by my agent, in the ordinary mode of bargain and sale, but that nevertheless the invoice which I now produce contains a just and faithful valuation of the same, at their actual market value or wholesale price, at the time of exportation to the United States, in the principal markets of the country from whence imported for my account (or for account of myself or partners); that such actual market value is the price at which the merchandise described in the invoice is freely offered for sale to all purchasers in said markets, and is the price which I would have received and was willing to receive for such merchandise sold in the ordinary course of trade in the usual wholesale quantities, etc. (Section 5.)

The duty of the appraisers is defined by section 10 as follows:

> That it shall be the duty of the appraisers of the United States, and every of them, * * * by all reasonable ways and means in his or their power,

> to ascertain, estimate, and appraise (any invoice or affidavit thereto or statement of cost of production to the contrary notwithstanding) the actual market value and wholesale price of the merchandise at the time of exportation to the United States in the principal markets of the country whence the same has been imported, and the number of yards, parcels, or quantities, and actual market value or wholesale price of every of them, as the case may require.

The function of the appraisers is to ascertain the actual market value and wholesale price of the merchandise at the time of exportation in the principal markets of the country whence exported. This is to be done irrespective of any invoice, affidavit, or statement. Upon the appraisers is imposed the duty of using all reasonable ways and means to determine correctly this question of fact, namely, the actual market value and wholesale price of the imported goods.

The actual market value or wholesale price is more fully defined by section 19—

> that whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States or consigned to the United States for sale, including the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind, and

> all other costs, charges and expenses incident to placing the merchandise in condition packed ready for shipment to the United States. * * *

The actual market value or wholesale price defined in this section includes the value of coverings and all other costs, charges, and expenses incident to placing the merchandise in physical condition ready for shipment to the United States. In ascertaining the dutiable value of merchandise, all these elements are considered by the appraiser. He hears the evidence, he uses all reasonable ways and means, he passes upon the questions of fact, and he ascertains and determines the actual market value or wholesale price of the merchandise as bought and sold in the principal markets of the country from whence imported, in condition packed ready for shipment to the United States. The cost of the coverings and the expenses incident to placing the merchandise in such condition is to be included in the actual market value or wholesale price ascertained by the appraiser.

Section 13 requires the appraiser to "report to the collector his decision as to the value of the merchandise appraised." The decision thus reported becomes "final and conclusive as to the dutiable value of such merchandise against all parties interested therein," unless the proper steps are taken to secure a reappraisement. By way of reappraisement, the matter of determining the dutiable value may be brought ultimately before the Board of General Appraisers. In this event the collector transmits to this board "the invoice and all the

papers" appertaining to the appraisement. It then becomes the duty of the board to examine and decide the case thus submitted, and "their decision, or that of a majority of them, shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein."

Here ends the method of ascertaining the dutiable value of the merchandise. No means of reviewing the decision of the Board of General Appraisers in a court is provided.

It now becomes the duty of the collector to "ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise, and the dutiable costs and charges thereon, according to law" (end of sec. 13), and—

> The decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage) shall be final and conclusive, (beginning of sec. 14),

unless a protest is duly filed and the action of the collector taken to the Board of General Appraisers for review.

The Board of General Appraisers, under section 14, has no jurisdiction to inquire into and impeach the dutiable valuation which has been reported to the collector by the appraiser. The only method of impeaching this valuation is by reappraisement under section 13, in which event the board may inquire into the facts reflecting upon the market value and wholesale price of the merchandise. If the importer does not take advantage of the

method of review provided by section 13, and allows the dutiable valuation to be reported to the collector, and the collector to liquidate the duties, relying upon the right of protest under section 14, he is restricted to a review, not of the action of the appraiser in determining the dutiable value, but of the collector in classifying the merchandise and liquidating the duties, including all dutiable costs and charges. What he is entitled to have reviewed under section 14 is a question of law and not of fact. This is evident from the language of section 15, which provides an appeal to the circuit court in case of dissatisfaction with the decision of the Board of General Appraisers under section 14. The decision of the board, which may thus be brought for review before the circuit court, is described in section 15 as a decision "as to the construction of the law and the facts respecting the classification of such merchandise, and the rate and amount of duties imposed thereon under such classification." What the court proceeds to hear and determine is "the questions of law and fact involved in such decision respecting the classification of such merchandise and the rate of duty imposed thereon under such classification."

CASES.

In *Muser* v. *Magone* (155 U. S., 240) Mr. Chief Justice Fuller, speaking for the court, said (p. 246):

> The conclusiveness of the valuation of imported merchandise made by the designated official, in the absence of fraud, is too thoroughly settled to admit of further discussion. (*Hilton* v. *Merritt*, 110 U. S.,

97; *Auffmordt* v. *Hedden*, 137 U. S., 310; *Passavant* v. *United States*, 148 U. S., 214.)

In *Hilton* v. *Merritt* (110 U. S., 97) it was held that the valuation of merchandise made by a customs officer for the purpose of levying duties thereon is, in the absence of fraud on the part of the officer, conclusive on the importer. Mr. Justice Wood, who delivered the opinion of the court, says (p. 104):

> The provisions of the statute law show with what care Congress has provided for the fair appraisal of imported merchandise subject to duty, and they show also the intention of Congress to make the appraisal final and conclusive. When the value of the merchandise is ascertained by the officers appointed by law, and the statutory provision for appeal has been exhausted, the statute declares that the "appraisement thus determined shall be final and deemed to be the true value, and the duties shall be levied thereon accordingly." This language would seem to leave no room for doubt or construction.

Again, page 106:

> Considering the acts of Congress as establishing a system, and giving force to all the sections, its plain and obvious meaning is that the appraisement of the customs officers shall be final, but all other questions relating to the rate and amount of duty may, after the importer has taken the required steps, be reviewed in an action at law to recover duties unlawfully exacted. The rate and amount of duties depend on the classification of imported merchandise, that is to say, on what schedule it belongs to.
>
> * * * * *

The valuation made by the customs officer was not open to question in an action at law as long as the officer acted without fraud and within the power conferred upon him by the statute.

The cases of *Hilton* v. *Merritt* and *Aufmordt* v. *Hedden* were decided under the statutes in force prior to the passage of the act of June 10, 1890. In *Passavant* v. *The United States* (148 U. S., 215), an attempt was made to impeach and review in court a decision of the Board of General Appraisers, under section 13 of the customs administrative act, ascertaining the dutiable value of certain imported merchandise. This court held that, in the absence of fraud or other misconduct imputing bad faith, the decision of the Board is final and conclusive. Mr. Justice Jackson, speaking for the court, after referring to the cases of *Hilton* v. *Merritt* (110 U. S., 97), and *Earnshaw* v. *United States* (146 U. S., 60), said (bottom p. 220):

> The provisions of the customs administrative act of June 10, 1890, as to the finality and conclusiveness of the decision of the Board of General Appraisers as to the valuation of imported merchandise, when that question has been regularly submitted to and examined by them, is expressed in clearer and more emphatic terms than in former statutes. The language is so explicit as to leave no room for construction. In the tariff legislation of the Government, Congress has generally adopted means and methods for a speedy and equitable adjustment of the question as to the market value of imported articles, without allowing an appeal to the courts to review the decision reached. If dissatisfied importers, after exhausting the remedies provided by the statute to ascertain and determine the

fair dutiable value of imported merchandise, could apply to the courts to have a review of that subject, the prompt and regular collection of the Government's revenues would be seriously obstructed and interfered with. The statute authorizes no such proceeding, and the circuit court can exercise no such jurisdiction.

## II.

The importers seek to avoid the general rule by claiming that the appraiser, acting without authority of law and upon a wrong principle of law, added an illegal item to the market value. The cases cited in support of this contention will be distinguished later.

The conclusive answer is, that the appraiser did not add any item to the market value. The German duty was not treated as a dutiable cost or charge. It could not be so treated, *for it was not paid*. The market value was not ascertained, and the German duty added as a separate and independent cost or charge. Irrespective of the invoice price, the appraiser was charged with the duty of ascertaining the actual market value and wholesale price of the merchandise at the time of exportation in the principal markets of Germany. In this determination the general market value and wholesale price of all goods of the same description in the German markets was the controlling consideration.

The question was not as to the special advantages which the importers may have enjoyed, and which may have reduced the cost of the goods to them. To ascertain the general market value of the goods was the aim and object

of the appraisement. In doing this the appraiser treated the German duty as an element worthy of consideration. From all the facts presented he reached the conclusion that the market value of these goods as bought and sold in the principal markets of Germany "equaled the sum of the net invoice value and the German duty added together." The duty was not added to but included in the market value. Whether it should be so treated and used as an element of value to reach the wholesale price in the German markets was a question of fact, not of law. It was a question of fact which the policy of the law submits to the custom officers for final and conclusive determination. All the cases relied upon by the importers turn upon the addition to the market value of independent illegal items, or upon errors of law outside of the valuation itself.

Thus, in *Oberteuffer* v. *Robertson* (116 U. S., 499) it was held that under the act of March 3, 1883, the cost of certain cartons or boxes, in which hosiery and gloves imported into this country were packed, could not be added to the market value in order to determine the dutiable value, and that the remedy for such illegal action was not by reappraisement, but by protest and appeal. Mr. Justice Bradley, speaking for the court, after reciting the statutes involved, says (p. 509):

> Such were the enactments in force when the act of 1883 was passed. When the duty was ad valorem, or based on the value of a given quantity or parcel of goods, there was, by section 2906 of the Revised Statutes, to be an appraisement here of the actual market value or wholesale price of the goods,

> at the period of exportation, in the principal markets of the country from which they were imported, and such appraised value was to be the dutiable value of the goods, as merchandise, without reference to any of the items required by section 2907 to be added as charges to such actual market value or wholesale price of the goods. All those items so required to be added were charges, and not part of the appraised value of the goods.

The act of 1883 relieved the importer from the obligation of paying duty on the charges described in section 2907. These charges being abolished, their addition by the collector was illegal, and the proper remedy was not by reappraisement but by protest.

> The addition of the items for cartons and packing was no part of the duty or function of the appraiser, acting under section 2906, to appraise the foreign market value of the goods. Although, in form, the appraiser added the items for cartons and packing, the action of the custom-house was only a decision of the collector, under section 2931, that the cartons and packing were dutiable costs and charges.

In this case the law involved was that existing prior to the passage of the customs administrative act. By section 2906 of the Revised Statutes, then in force, the appraisement was of the actual market value or wholesale price of the goods at the period of exportation. By section 2907 certain items were to be added as costs and charges. The act of 1883 exempted the importer from paying duty on these costs and charges. But under the customs administrative act such costs and charges are

not added to but included in the market value as ascertained by the appraiser.

In *Badger* v. *Cusimano* (130 U. S., 39), a case involving the same statutes construed in the case of *Oberteuffer* v. *Robertson*, this court followed the latter case in holding that the duties on certain imported oranges were to be ascertained with reference only to their true and actual market value, and without reference to the charges for boxing and packing them. The invoice gave the market value of the oranges and also the charges for boxes and packing. The customs officers reduced the charges for packing, and increased, by that same amount, the invoice value of the oranges upon which the duties were levied. The court held the collector acted without authority, saying, by Mr. Justice Harlan (p. 43):

> The only inquiry is whether the collector acted within the power conferred upon him by statute when he required the importer to pay duty not only upon the actual market value of the goods, but upon such additional value as is equal to the reduction made from the value of the cases covering the goods. These are questions of law simply, involving the power of the collector under the statute. They are entirely apart from any inquiry as to fraud in the appraisement or as to the value set forth in it, and may be raised by the importer in an action at law when he has taken such steps as entitle him to bring suit for the recovery of duties illegally exacted from him.

In *Robertson* v. *Frank* (132 U. S., 17), this court, following the Oberteuffer Case and the Badger Case, sustained a suit to recover duties assessed upon alleged

transportation charges illegally added to the market value under the supposed authority of section 2907, Revised Statutes. In the opinion, delivered by Mr. Justice Bradley, the court points out the distinction between the appraisement of the market value of the imported goods and the addition of costs and charges under section 2907. As to these charges, no discretion was imposed in the appraisers. The actual charges paid must be added and nothing additional. If more than the actual cost or charge was added, it became a matter for examination and correction. I quote from the opinion the following language (bottom p. 24):

> What is complained of in the present case is, that the plaintiffs were required to add to the market value of the goods at the places from which they were exported transportation charges and expenses for labor which were never incurred. If that complaint is well founded such additions can not be maintained, for while the appraisers are not limited to the actual cost of articles exported, but may place upon them their market value at the places from which they were imported, and their estimate of that market value is conclusive, it could not, while the law required the addition to that market value of additional charges of transportation, etc., exercise any discretion as to those charges, but were confined to the actual cost thereof when such cost could be shown. It was "cost," not "value," which was required in that part of the estimate of dutiable value."

It will be noted that in each of these three cases an illegal item was added to the market value. In the Oberteuffer Case, the item was for cartons and packing hosiery and gloves; in the Badger Case, for boxing and

packing oranges; in the Robertson Case, for transportation charges. In neither case was there an attempt to impeach the valuation made by the appraisers. The court was careful to point out the distinction between ascertaining the market value, and adding a specific independent item to that value when ascertained, and to say, in the last case mentioned, that "whilst the appraisers are not limited to the actual cost of articles exported, but may place upon them their market value at the places from which they were imported, and their estimate of that market value is conclusive," no discretion was confided to them in the matter of adding costs and charges under section 2907.

The case at bar does not present any question involved in either of the cases discussed, but is similar, in many respects, to the more recent case of *Muser* v. *Magone*, 155 U. S., 240.

In *Muser* v. *Magone* the appraisement was attacked, not on the ground that any illegal item had been added to the market value to make the dutiable value, but on the ground that certain items or elements of value had been illegally added to and included in the dutiable value. The imported goods were cotton embroideries. The cloth on which the embroiders rested was purchased in the gray state by the importers at Manchester, imported thence to St. Gall, Switzerland, where the embroideries were finished, and thence exported to the United States. The importers owned the plant at St. Gall. The entered value of the goods was raised by the appraisers about 10 per cent. The importers protested against the standard of value adopted by the appraising

officers upon various grounds—among others, because commissions and nondutiable charges had been illegally added to and included in the market value; because the goods should have been appraised at their actual market value in the gray, adding the cost of finishing and laundering them, and for other reasons; the protest, to use the language of Mr. Chief Justice Fuller, top page 248, being directed "to the alleged illegality of the valuation * * * because, as alleged, one of the constituent elements of the value as found was illegally included."

The court held that the appraisement, in the absence of fraud, was conclusive; that the dutiable market value was to be determined by the general market value, without regard to special advantages which the importer might enjoy, and that in ascertaining that value it was proper to consider a number of elements of value. The court would not attempt to inquire into the mental processes of the appraisers in determining the valuation.

The court, speaking by Mr. Justice Fuller, says (p. 250):

> The question was not whether, through the special advantages which Muser Brothers enjoyed, the actual cost to them may have been less than what was decided to be the actual dutiable value of their goods, for the matter was determined by the general market value and wholesale price of all goods of the same description.

This is pertinent in considering whether the fact that the German duty was not paid is controlling in the case at bar. I submit it is not, the question being what was the general market value and whosesale price of cotton

velvet as bought and sold in the principal markets of Germany.

Again, top page 251:

> The issue made by the protest was that the valuation was illegal because including certain specified incidental expenses (one or more of them) as for designs, salary of buyers, clerk hire, rent, interest, and percentage on aggregate cost. Upon the theory of an ascertainable market value at St. Gall, these were matters to be considered and in a sense included, but not in the sense of substantive items independent of market value added thereto to make dutiable value.

So, in the present case, the German duty, upon the theory of an ascertainable market value in Germany, was a matter to be considered and in a sense included, but not in the sense of a substantive item independent of the market value added thereto to make dutiable value. The German duty was included only because the appraisers found, as matter of fact, that the market value in Germany was equal to the invoice price plus the German duty.

Again, bottom page 261:

> The course of business at St. Gall in respect of these embroideries was peculiar, and to reach a result, in estimating the value, required the consideration of many elements making up the amount which actually represented the pecuniary basis of transaction. How these various elements impressed the general appraisers and what grounds influenced or controlled the mental process were matters in respect of which he could not be interrogated, since

> his decision, when approved by the collector, is final. * * *
>
> The adjudication was of true market value, and did not consist in taking market value and adding the costs and charges specified in 2907 in order to get at dutiable value.

In *United States* v. *Kenworthy* (68 F. R., 904) certain items which the importers claimed to be commissions and charges (exempt from duty by the act of March 3, 1883), were treated by the appraiser as elements of value, entering into the wholesale price and market value of the imported goods. The court held that in the absence of fraud the action of the customs officers in including these items as elements of value in the wholesale price was final and conclusive. Judge Acheson, speaking for the circuit court of appeals, says (p. 908):

> It can not be successfully maintained that, under the seventh section of the act of March 3, 1883, all so-called "commissions" and other charges which may be claimed by an importer are to be allowed without inquiry as to their real nature and rightfulness. Undoubtedly it is the right and duty of those appointed and empowered to pronounce judgment upon the question of dutiable valuation to make such inquiry; and when, as the result of such investigation, the designated officials find that an alleged commission has no proper relation whatever to the importation, but that it is really part of the price of the merchandise, and they take that fact into consideration in making their appraisement, they do not transcend their rightful authority. But if the general appraiser and the collector acted here within the limits of their statutory authority, then, in the

absence of fraud (of which there is no pretense), the valuation made by the former, when confirmed by the latter, became final and conclusive.

In *Wanamaker* v. *Cooper* (69 F. R., 329) the appraiser added to the invoice price a commission of 2½ per cent claimed as a discount for cash paid. This was done, as the appraiser said, "to make market value." The action of the appraiser was sustained by the Board of General Appraisers under the customs administrative act, and the importer applied to the circuit court for a review of the decision of the board. Judge Dallas sustained the action of the appraiser, saying: "It must be assumed that the discounts which were disallowed by him were not arbitrarily rejected, but were taken as the measure of the advance which he deemed it his duty to make in appraising the true and actual market value of the merchandise." The remedy of the importer was by reappraisement, not by protest.

III.

The so-called German duty was lawfully considered and included as an element of value in determining the actual market value or wholesale price of the cotton velvets at the time of exportation in the principal markets of Germany.

Section 19 of the customs administrative act requires the duty to be assessed upon "the actual market value or wholesale price of such merchandise, *as bought and sold in usual wholesale quantities*, at the time of exportation * * * in the principal markets of the countyr from whence exported." "Such actual market value,"

using the language of the manufacturer's declaration under section 5, "is the price at which the merchandise described in the invoice *is freely offered for sale to all purchasers* in said markets."

The subsequent language of section 19 relates simply to the physical condition of the merchandise at the time of shipment, and does not subtract from but adds to its value. The goods must be appraised in the condition in which they are bought for exportation, including the value of all coverings and all other costs and charges.

In the principal markets of a particular foreign country at a certain time each kind of merchandise must have an actual market value, and but one market value. The *price* at which merchandise is freely offered for sale to *all* purchasers is one price, not two prices. To find this price in the markets of Germany was the duty of the appraiser and the object of the appraisement in the case before the court. Obeying the law, the appraiser had to ascertain the actual market value of the cotton velvets in the German markets—the price at which in those markets they were freely offered to *all* purchasers. To do this, he had to treat the German duty as an element of value and add it to the net invoice price.

According to the statement of facts, the German duty is imposed on merchandise when it is sold by the manufacturer "for consumption or *sale* in the markets of Germany;" that is to say, when the manufactured goods pass from the bonded factories into the German wholesale market they become subject to the tax. The manufacturer must add the tax as soon as he sells the goods in

Germany, for he has to pay it. As soon, therefore, as these goods reach the German markets their wholesale price includes the tax.

Suppose a purchaser goes into the German markets to buy these cotton velvets in wholesale quantities. He does not state what he is going to do with them. What price will he have to pay? Certainly one which will cover and include the duty imposed on all goods sold in the German markets. Partly manufactured goods, imported into Germany, bonded, there finished, and then exported, escape the duty, but they never reach the German market. If they do, then we have two market values and two wholesale prices at which the goods are freely offered to all purchasers in the same markets at the same time.

The statute requires the appraiser to ascertain the actual market value and wholesale price in the principal markets of Germany. This is one market value and one wholesale price. It is not *the purchase* in the markets of Germany, but *the price* in the markets of Germany, which controls. A purchase may be made in Germany of goods outside of Germany. A purchase may be made in Germany of goods whose actual cost to the purchaser is determined by conditions outside of Germany. If the goods are imported from Germany, this will not avail, however, to free the importer from the obligation of paying duty on the market value of such goods *in* Germany, the wholesale price determined by the conditions affecting all goods in the German market. In other words, the market value *in* Germany, not *outside of* Germany, or *after leaving* Germany, is the end and object of the appraisement. *In* Germany the price of cotton velvets

includes the duty; *outside of* Germany, and *after leaving* it, the cotton velvets escape the duty, which is remitted or refunded to encourage exportation and aid the introduction of German goods into other markets.

This bonification of tax is virtually the payment of a bonus. It is a privilege—a favor dependent upon the policy or caprice of Government. It is granted upon conditions; it may be allowed to one class and refused to another. To encourage manufacturers to import cotton velvets "in the gray" into Germany, finish them there, and export them, the German tax imposed upon all cotton velvets manufactured in Germany and sold there may be remitted or refunded. This is a special privilege which does not affect the price of cotton velvets generally in the German markets, and hence can not be taken into account by the appraiser. He must look to the price in the German markets, not consider the special advantages enjoyed by the particular importer which may reduce the price to him.

I submit there is no substantial difference between the bonification of tax, as in this case, and the allowance of a drawback to encourage exportations. In a recent decision of the Board of General Appraisers (Ty. Synopsis, No. 17386—G. A. 3577) it was held that an allowance for drawback, made by the French Government on importation of certain silk goods from that country to the United States, would not operate to reduce the market value of the goods for customs purposes here, the board saying:

> "Drawback" is defined by Abbott's Law Dictionary to be "a remission or repayment upon the

exportation of merchandise of duties which have been previously paid upon it."

Wharton's Law Dictionary says:

"A drawback is a device resorted to for enabling a commodity affected by taxes *to be exported and sold in the foreign market* on the same terms as if it had not been taxed at all. It differs in this from a bounty, that the latter enables a commodity to be sold abroad for less than its natural cost, whereas a drawback enables it to be sold exactly at its natural cost."

It is evident that the price paid for the goods in the markets of France amounted to a sum that, *prima facie*, included the item of drawback which is proposed to be deducted. The right of drawback is a separate and distinct claim of the exporter against the Government for a certain refund of duties. It accrues after purchase, and only in the contingency of exportation. If the goods are not exported it does not accrue and will not be paid. It can not, therefore, be deducted from the price actually paid by the vendee of the goods to the vendor.

If the contention of the importers is correct, there were two actual market values and wholesale prices for these cotton velvets in the German markets at the same time. I submit that the policy of our customs laws and their effective administration forbid a view of the law that would require the appraisers to find that the same kind of goods have two distinct market values in the same country at the same time. The law contemplates that cotton velvets of the same kind at the same time and in the same country will have but one actual market value and wholesale price for purposes of appraisement under the customs laws of this country.

In the case of *Ballard* v. *Thomas* (19 How., 383), this court held that a discount for part payment could not be considered as affecting and reducing the invoice price of imported iron. Mr. Justice Nelson, delivering the opinion of the court said (p. 382):

> There is no change, however, in the rule which must govern in making the valuation—it is the actual market value or wholesale price in the principal markets of the country from which the article shall have been imported.
>
> * * * * *
>
> In respect to the deduction from the price on account of prompt payment, we think the fact does not vary or affect the price of the article, as stated in the invoice. It relates simply to the mode of payment, which may, if observed, operate as a satisfaction of the price to be paid by the acceptance of a less sum.

What difference is there between a special advantage offered to exporters by a foreign government and special advantages offered by a private individual? Suppose any great manufacturer abroad, for the sake of introducing his goods into this market, should make a special rebate to American buyers. Would such reduction below the actual wholesale price of the goods in the market of the country whence exported avail to diminish their dutiable value for assessment here? Clearly not. In every instance the appraisers must go to the principal market of the country whence the goods are imported for the purpose of ascertaining the actual market value there at the time of exportation.

## IV.

The decision of Judge Wheeler in this case in the circuit court proceeds upon an erroneous interpretation of the facts. He says the appraiser added the German duty to the wholesale price of the goods in Germany as a cost or charge. Since the duty was not paid this could not be done, and the case of *United States* v. *Jahn* (155 U. S., 109) was cited as showing that a protest under section 14 was the proper method of reviewing and correcting such erroneous addition to the market value.

But the German duty was not added as a cost or charge to the wholesale price or market value. It was considered and included as an element of value in ascertaining the actual market value and wholesale price of the goods in Germany. The case of *United States* v. *Jahn*, which grew out of the exaction of a fee or charge for gauging molasses under section 3023, Revised Statutes, has, of course, no application to the case at bar wherein the attempt is made to review the decision of the appraisers ascertaining and fixing the dutiable value of imported goods.

It is submitted that the first question certified should be answered in the negative; or that, if answered in the affirmative, the second question should be answered in the affirmative also.

JOHN K. RICHARDS,
*Solicitor-General.*

NOVEMBER 22, 1897.

○

# Supreme Court of the United States.

OCTOBER TERM, 1897.

| | |
|---|---|
| THE UNITED STATES, appellant, vs. FREDERICK S. PASSAVANT ET ALS. | No. 129. |

## APPELLEES' BRIEF.

### Statement.

Between May 22, 1891, and March 13, 1892, the appellees, Passavant & Co., imported into New-York cotton velvets from Germany. These velvets had been imported into Germany 'in the gray', there dyed, finished and put into bond for exportation. (Rec. 1, fol. 2.)

Their invoices stated the net invoice value of the merchandise; and also, under duress, certain other sums under the heading 'German duty,' which is a tax the German government imposes only when the goods are sold for consumption in that country. When purchased there in bond (or consigned while there) for exportation this duty is remitted; which remission is known as a 'bonification of tax,' as distinguished from a tax collected and refunded. This 'German duty' is a tax levied upon the goods when consumed in

Germany; collected only when the finished product goes into consumption there, but remitted when that finished product is sold in bond for exportation. The merchandise can be purchased in bond, for exportation, in the principal markets of Germany, at the net invoice prices, without payment of this so-called 'German tax.' These goods, so imported by appellees, were so purchased for exportation. *(Ibid.*, pp. 1, 2, fols. 2, 3.*)*

The local appraiser reported to the collector, as the *dutiable* value of these goods, the aggregate of the net invoice values plus this 'German duty;' adding as an element of *dutiable* value the amounts so specified under the heading 'German duty' to the net invoice values. *(Ibid.* 2, fol. 3, § 10.*)*

These amounts of 'German duty' had been included by the importers in their entries, in the form abovementioned, under duress, to avoid threatened penalties under the law. *(Ibid.*, fol. 3, § 9.*)*

The collector assessed duty upon the gross amount so reported to him by the local appraiser. Without calling for any re-appraisement, the importers seasonably protested, in substance, against the illegal inclusion of this so-called 'German duty' in the *dutiable* value adopted by the collector as the basis of his assessment and exaction of duties. *(Ibid.* pp. 2, 3; fols. 3, 4, 5.*)*

The Board of General Appraisers reversed the collector " upon the ground that this 'German duty' *was not a lawful element of dutiable value.*" *(Ibid.*, 3, fol. 4, § 12.*)*

The Circuit Court sustained this action of the Board. *(Ib.* fol. 5, § 13.*)*

Upon the government's appeal to the U. S. Circuit Court of Appeals, that Court submits to this Court these two questions, viz.;—

" 1. In proceedings brought before the Board of General Appraisers by protests, under Sec. 14, act of June 10, 1890, to review the collector's decisions upon the entries in this case, had the Board jurisdiction to

inquire into and impeach the *dutiable* valuation so reported to the Collector by the appraiser, as above stated, and upon which the collector assessed the rate of duty to which the merchandise was lawfully subject? (Rec. 3, bottom.)

(2.) "If the first question is answered in the affirmative, was the 'German duty' lawfully included by the Appraiser in his estimate of *dutiable* value?" *(Ibid.* 4, top.*)*

## POINTS.

### 1.

### Board's Jurisdiction.

Upon every principle of justice, as well as by the practice and precedents heretofore prevailing, and (as we understand them) according to this Court's decisions construing the very provisions now in question, the Board of General Appraisers had the right, exercised by it, to inquire into the *legality* of the collector's action, and to correct his error of *law*, upon protest.

The government's contention to the contrary, "so far as it relies on authority, fails in precedent; so far as it rests on principle, fails in reason." (9 B. & S. 538.)

The sum of the decisions is this; an appraiser's honest action and judgment in the ascertainment of *a legally-prescribed market value*, is conclusive, and cannot be impeached by proof adduced to show it excessive *in fact*, however arrived at, *provided* the officer kept within the requirements of law in determining it. In the hardly-supposable case of fraud, this would nullify the appraisement, as it vitiates everything. If, without fraud, the appraiser, or collector, exceeds his power by going beyond, instead of according to, the

law, this is proper ground of protest; and this is the proper method of correcting such legal error.

This Court has expressed it, that if *a wrong principle* is applied, the appraisal is not conclusive, but can be judicially corrected, upon protest.

Stating the general rule, as to the conclusiveness of an appraiser's valuation, BRADLEY, J. adds;—

"But whilst this is the general rule, it is subject to the qualification that if the appraiser proceed upon a wrong principle, contrary to law, and this be made to appear, his appraisement is not unimpeachable".

Robertson v. Frank, 132 U. S. 24.

Badger v. Cusimano, 130 *Id.* 39,

where it is said (p. 43); "The only inquiry is, whether the collector acted *within the power conferred* on him by statute", etc. (130 *Id.* 43.)

Hilton v. Merritt, 110 *Id.* 106 is there cited. *(Ibid.)*

In that case (130 U. S. 39) the impeachment of the collector's action was that, "without pretending there was any mistake or fraud in the invoice value of the fruit, caused an appraisement of each importation to be made" which was illegally made to include charges, etc. *(Id.)*; cited in 132 *Id.* 26, where the appraisement adopted by the collector was held illegal. Reference is there (132 U. S. 126) made to Oberteuffer v. Robertson, 116 *Id.* 499, where the appraiser added the cost of cartons "to make market value, in marketable condition." (116 U. S. 501.) It was held the remedy was by protest, not by reappraisement. *(Id.* 515-6.*)*

Arthur v. Goddard, 96 U. S. 145.

This is in conformity with Judge CURTIS' opinion, in Burgess v. Converse; that the importer is not bound to take an appeal "if the government appraisers have not proceeded in conformity with the authority conferred on them by law." In my judgment, he may and should, in such a case, make his protest, and point out the irregularity", etc. (2 Curtis, 220.) In this Court, where the judgment in

this case was affirmed, the dissenting chief-justice and associates did not question that a protest was the proper course of procedure, but they did not consider the one there filed sufficiently specific. (18 How. 418.) The whole Court could not fail to agree that the acts of Congress impose limitations on the authority of the appraisers "and *determine the conditions on which the validity of their assessment depends.* (*Ibid.* 416.)

Greeley v. Burgess, 18 How. 413.
*Arthur v. Goddard, 96 U. S. 147.*
Oberteuffer v. Robertson, 116 *Id.* 499.
Oelbermann v. Merritt, 123 *Id.* 356.
Auffmordt v. Hedden, 137 *Id.* 324, bot.
Earnshaw v. U. S. 146 *Id.* 66.
1 Blatc. 346; 2 *Id.* 385 and 401.
3 *Id.* 117; 122; 126-7; 142; 145; 368; 378; 385; 399.

In the tobacco case, the opinion, per SHIRAS, J., notices, *en passant*, as a well-understood principle, that "an attack upon the *legality* of the appraisement, for the purpose of having it declared illegal, would be the only means of redress *by a court* for an illegal exaction of duties based upon an *erroneous* valuation". Erhardt v. Schroeder, 155 U. S. 130; Arigat v. Hedden, *Ib.* 228.

That is our claim; that the *dutiable* value was *erroneously* excessive through the adoption of a method not sanctioned by law.

*Whether the action of an appraiser*, directed, sanctioned, or adopted by a collector, *is within or transcends the limitations upon his power;* whether he has complied with or disregarded "the conditions upon which the validity of his appraisement depends" (18 Howd. 416); whether his acts are in conformity with or contrary to statutory requirements; MUST *be a question of law;* a judicial question;—hence, to be raised by protest, as the decisions uniformly declare.

A protest which raises this question (as ours does;

Rec. 2, 3; fol. 4) duly filed, and transmitted to the Board, gives the Board of General Appraisers jurisdiction to hear and determine that issue, however they may decide it.

Cornell v. Williams, 20 Wall. 249.

The Board has the same power, under Sec. 14, Act of June 10, 1890, to inquire into the *legality* of an assessment that they have under Sec. 13, to see whether or not it is excessive through an error of judgment on the legitimate facts.

To find out whether an appraiser or collector has obeyed or disobeyed the law, it must be ascertained just what he has really done.

In the present instance, the Board found the importers had stated "the net invoice value" of their merchandise; and under a different heading—*not* as part of this invoice value—the German duty (Rec. 1, fol. 2, § 5); that the latter was inserted 'under duress' *(Id.* 2, fol. 3, § 10*)*; that these, German duty, items were added by the appraiser, as an element of *dutiable* value, to the net invoice values *(Ibid.)*; which items the Board found not to be lawfully an element of *dutiable* value, and reversed the collector's action. *(Id.* 3, fol. 4, § 12.*)*

*En passant*, note it was as part of *dutiable*—not of foreign-market—value that the local appraiser added this 'German duty' to the correct net invoice values. The dutiable value is, generally, the foreign market value plus such additions as existing law may require to be made. We do not consider the *form* in which the appraiser makes his return as of vital consequence; or that his returning as part of his ascertained 'market value' an item which the law makes non-dutiable would exclude proof of such inclusion to vitiate the appraisal—Oberteuffer and the other "coverings" cases show that such form of return does not shut out proof of what he treated as elements of market value—but we wish to note that, in the present case, the sum made up

by adding this German duty to invoice values was returned as the 'dutiable' instead of the 'market' value because the appraiser personally did not deem it part of the market-value, and thus framed his return to facilitate the presentation of the legal question of the propriety of the assessment for duty of this item.

It is only the value in the principal foreign markets that the law requires the collector to cause to be appraised (R. S. § 2906) and the appraisers to ascertain. (*Id.*, Sec. 2902; Act of June 10, 1890, Sec. 10-26, Stats. 136.)

Claiming here that the Board had jurisdiction to review the *legality* of the collector's and appraisers' action relative to *market* value, we will further note, in a subsequent division of this brief, the difference between market and dutiable value; since, *a fortiori*, have the Board the indisputable right to review the latter under Sec. 14, Act of June 10, 1890. See *post*, pp. 15-19, division III.

The question whether the appraiser's (and collector's) action was legal or illegal is presented by the second question certified by the Circuit Court of Appeals, and is immaterial under the first;—which only asks whether the Board of General Appraisers have jurisdiction to inquire into the *legality* of the appraiser's (so, incidentally, the collector's) doings when an importer protests against them as illegal, after they have been adopted by the collector as the basis of his assessment and exaction of duty.

Such jurisdiction must exist:—else the most explicit and mandatory provisions of law are nullified, or are made merely directory to an administrative officer, who can disregard them at will, so long as he is not guilty of fraud in so doing; making them only binding upon him *in foro conscientiæ*. Such construction of statutes affecting vast commercial and pecuniary interests cannot be correct.

Congress must have perceived the truth of Justice BRADLEY's observation, that "Discretion in the custom-house officer should be limited as strictly as possible. It has been said with much truth, that where law ends, tyranny begins." (104 U. S. 702 top.)

## II.

## Second Question. Appraiser's action illegal.

"(2.) If the first question is answered in the affirmative, was the 'German duty' lawfully included by the appraiser in his estimate of *dutiable* value?" Rec. 4 top, fol. 5.)

This question must be answered in the negative.

The nineteenth section of the administrative act of June 10, 1890, states;—

"that the duty shall be assessed upon the actual market-value or wholesale price of such merchandise as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of the country from whence imported, and in the condition in which such merchandise is *there bought and sold, for exportation to the United States*," etc. (26 Stats. 139, bottom, § 19.)

The eighth finding of the Board of General Appraisers states the facts that

"(8) The merchandise can be purchased in bond for exportation in the principal markets of Germany, at the net invoice prices, and *without* paying the so-called German duty. *The merchandise involved in this action was so purchased for exportation.*" (Rec. 2, top, fol. 3, § 8.)

Whatever else may be argued as to this nineteenth section, the use we wish to make of it here is, that it is a recognition by Congress, in the very enactment of this law, of the existing *fact*, found by the Board to be a fact, that there is a value, in principal foreign markets, attaching to merchandise, there freely bought and sold to anybody choosing to buy, in the ordinary course of trade, for exportation; there so dealt in, as a subject of export trade; "in the condition" to be exported to the United States, and peculiarly in that condition.

Then the inquiry is, what is the value of *such* merchandise, so situated, in the open markets of its purchase and sale, at the d te of its exportation.

If similar goods, dif ntly situated and conditioned, have there a different ue, this is not the value upon which our laws base ou duty. Its value as an export governs.

This language was adopted by Congress after the Treasury Department had acquiesced, for a quarter century in the legal construction for which we now contend. Ever since the beginning of 1871, this German duty has been held no part of the dutiable value of merchandise imported from Germany, until about the date of our importations, when this long-prevailing custom was abandoned, and the German duty was added to make dutiable value, as stated in this record.

In 1869, the question arose as to certain malt imported by Murray, Nelson & Co. into Chicago from Canada, where it had been purchased in bond. The Secretary directed the Collectors of Chicago and New York to include in the valuation of such merchandise for duty the consumption tax, not exacted in the country of production if the goods were exported. Murray, Nelson & Co. protested and brought suit, which was tried in the latter part of 1870, before Judge BLODGETT, who sustained the protest; holding the inclusion of the tax on consumption in the dutiable value of goods bought in bond to be illegal. This case is not reported;

but the acquiescence of the Treasury Department in this decision is stated in SS. 775, which is in the form of a letter, which was addressed by Secretary Boutwell to Thomas Murphy, then Collector of the Port of New-York. It bears date January 5, 1871, and says:

"The Department, *after due consideration*, has concluded to acquiesce in the decision of the United States Circuit Court, and reverse its former instructions accordingly.

"The dutiable value of malt imported from Canada will, therefore, hereafter be taken at its value in bond in that country, when it shall satisfactorily appear that the article was purchased in bond.

The same rule will be held applicable to tea, coffee, wine, etc., exported from England to the United States which are chargeable with duty on their entry into consumption in that country, but which is not exacted on the exportation thereof from bond, and *also to any other importation similarly situated.*" *(SS. 775.)*

Of this instruction, the Courts take judicial cognizance. Caha v. U. S., 152 U. S. 212.

In addition to acquiescence in the malt decision by Judge BLODGETT, the Treas. Dept. acted in conformity therewith in U. S. v. Leigh, 39 F. R. 764, and declared, June 14, 1883, that a foreign patent was no element of the duty on imported goods. SS. 5759; referring to SS. 3196 April 11, 1877, in which Secy. Sherman said;—

"The report of the appraiser presents the question whether a value can be accepted as a basis for assessment of duty upon books which is less than the value for consumption in the country of export. He states that, in many instances the publisher is compelled to pay a royalty to the author upon works sold for consumption in the country of export which is not paid when the books are exported. *I think it clear that the dutiable value does not include such royalty.*"

He then cites the department's ruling as to tea, and Judge BLODGETT's malt decision.

As to the royalty considered in SS. 5759 Asst. Sec'y French noted that—

"The right to use the article in Great Britain is not bought or sold in this contract for this merchandise, nor is such right an incident in any way to the transaction. The bottles [subject of English patent, and of duty here] are not intended to be used in Great Britain, and there seems to be no reason why the purchaser should pay for the right to use them in Great Britain, which neither he nor the seller contemplates."

SS. 9800 is of similar purport, except that it expressly relates to this German duty, addressed to the U. S. Appraiser at New-York, dated January 9, 1890, nineteen years after that above quoted. Its tenor is this:—

"SIR, The letter of Asst. Appr. Birdsall, with your indorsement of the 16th ultimo is received, concerning cotton velvets imported from Germany, which were there dyed and completed from fabrics imported into that country in the grey and exported with allowance of a rebate of the duty paid on the raw fabric. The question is submitted as to whether the German duties should be estimated as an element of the dutiable value of the goods.

As stated by the assistant appraiser, the question now raised was long since determined by the court (the Department acquiescing, SS. 775) to the effect that where goods are purchased in bond in a foreign country the tax or duty does not form an element of market value.

It is therefore suggested that upon appraisal of the merchandise mentioned, action should be had in conformity to such ruling."

It will be perceived (if this letter accurately states the position) that the Treasury here extends the principle beyond the Malt case, to goods which have once paid the impost and had it refunded; which was not the malt case, *nor is it ours;* no tax was asked of us.

Mr. Birdsall was the assistant-appraiser who reported upon our goods also.

These rulings were cited by the Board of General Appraisers, which, after making findings substantially

reproduced in the record (pp. 1 to 3, fols. 2 to 5) observed;—

"We have made the foregoing findings of fact *after extended inquiry and investigation.*"

After stating the question at issue, the Board says;—

"*There is nothing in the several appraisers' returns which indicates that these officers professed to ascertain the market-value of the goods per se to be more than the value specified in the invoice*, with the lawful charges added, as authorized by § 19, act of June 10, 1890. As said in Goddard v. Arthur, 96 U. S. 145, where the appraiser disallowed certain discounts in estimating market value, '*they simply gave a construction to the invoice*'. They decided, in other words, *as a legal proposition*, that the invoice, plus the tax, was to be taken as the proper market value.

The practice of the Customs officers, for nearly twenty years prior to the enactment of the act of June 10, 1890, has been not to include this German duty in the estimate of market value."

Here follows mention of the decision of the Circuit Court (per BLODGETT, J.) and of the Treasury Department's acquiescence, and subsequent rulings, and a quotation from Robertson v. Downing, 127 U. S. 613, that such acquiescence "is not to be disregarded without the most cogent and persuasive reasons."

The Board's opinion proceeds;—"This principle, so often repeated by the U. S. Supreme Court, is entitled to still more consideration when applied to a department ruling *on an authoritative judicial decision*, as in the present case."

Edwards v. Darby, 12 Wheat. 210.
U. S. v. State Bank, 6 Pet. 39.
U. S. v. Alexander, 12 Wall. 179–181.
Peabody v. Stark, 16 *Id.* 244.
Smythe v. Fiske, 23 *Id.* 382.
U. S. v. Moore, 95 U. S. 763.
Same v. Pugh, 99 *Id.* 267–9.
Hahn v. U. S. 107 *Id.* 406.
Brown v. Same, 113 *Id.* 570–1.
U. S. v. Hill, 120 *Id.* 182–3.
Same v. Philbrick, *Ibid.* 59.
Same v. Alabama, 142 *Id.* 621.
Same v. Un. Pac. 148 *Id.* 572.
Mich. v. Jackson, 37 U. S. Ap. 228–9.

So many cases are not cited to show the principle indisputable, but to indicate the application of it; as Mr. Justice BREWER observed, in U. S. v. Un. Pac., 37 F. R. 556, top (affirmed 148 U. S. 572) "it is interesting to note *the growth* of this principle in our law. From the time Justice TRIMBLE announced it so cautiously, in 1827, it has gained strength every time it was again considered by the Court. Impelled by the force of its inherent justice, every judge who has taken it up has stated it more strongly than it was stated before. And this is a case where that doctrine is eminently worthy of application." (37 F. R. 556.)

In a case touching the retention of interest upon the discount of a note, thus actually receiving more than the statutory rate, the N. Y. Court of Appeals, while admitting this to be contrary to the natural reading of the statute, yet considered the decisions of the lower Courts, that such discount did not violate the usury laws, had been too long followed to be changed. The Opinion, per DENIO, J., proceeds:

"It does not, however, in my opinion, stand less firmly than it would do had it the sanction of legislative authority. I disclaim altogether any right in this Court to overturn a principle which has been established and uniformly acted upon for nearly forty years, and during that time has frequently been reaffirmed by our principal courts of *original* jurisdiction, though it should happen not to have been adjudged by the court of ultimate appeal." Marvine v. Hymers, 12 N. Y. 231 top.

An element which, *in fact*, never entered into the market value, anywhere, but which was expressly excluded from it in Germany, is nowhere a part of it *in law*. There is no such thing as a constructive market value *in law*, which does not exist *in fact*.

We paid the price at which the owner held the goods, for sale to anybody; the price at which they were freely offered to all the world. If a German

bought them for use at home, he would have paid a tax on consumption; but the goods in bond are not subject to it; and never become so, if exported.

If our goods had been made liable to pay it, by the terms of the law, it would be no reason for not computing it, because (by oversight or otherwise) they may have escaped the payment; but they never did so become liable.

*The tax in question was laid upon the* CONSUMPTION *of goods; not upon the goods per se.* It was a license to consume.

This tax, included by the collector, was *remitted* by the German government; *not* collected and refunded, like our drawbacks.

Yet the Supreme Court said the legal effect of our refunding was to make the exported imports free.

> "The purpose of the drawback provision is to make duty free imports which are manufactured here and then returned," etc. . . . —articles which are not sold or consumed in the United States. . . . The drawback provision was simply a mode of making the linseed, so imported and exported, without distribution in the country, *duty free*", etc.
>
> Campbell v. U. S. 107 U. S. 413.

More decidedly is this true of articles upon which no duty has been levied;—as to which the state of facts which alone justify its imposition has never existed.

A somewhat analogous case (but not so strong for the importer as ours is) is that of U. S. v. Leigh, 39 F. R. 764, cited *supra* in which it was adjudged erroneous for the collector to include in the appraisement, made under his direction (R. S. § 2906), as part of the dutiable value of a machine, patented in England, the royalty fee paid by a purchaser for its use in the United States, which was included in the gross sum he paid the vendor, when he bought the machine in England, but *not* as part of the price of the machine itself. Judge COLT said:

"It is agreed that in the purchase by the defendant in England of the machine the royalty-fee formed no part of the purchase-price paid by him. *It is difficult*, THEREFORE, *to see how it can be held to be part of the market-value or wholesale price there*, simply because the purchaser from the defendant [importer] was obliged to pay a royalty fee for its use in this country. *Suppose a machine had been purchased in England for use in some country where there was no patent upon it;* COULD IT BE HELD THAT THE ROYALTY FEE EXACTED FOR ITS USE IN THE COUNTRY WHERE IT WAS PATENTED SHOULD BE ADDED IN ESTIMATING THE MARKET-PRICE." (39 F. R. 764.) See, accordingly, ss. 5759 quoted *ante*, p. 16.

The tariff-act of Aug. 28, 1894, in par. 182½, relating to sugars, imposes one mill additional duty upon all sugars from countries paying a bounty upon export, with a proviso that it should not be laid on sugar shown to have received, upon exportation, merely a rebate of the duties paid upon the importation of the material from which it was made.

## III.

## Dutiable vs. Market value.

The facts stated as the basis of the inquiries made show that the collector's assessment, against which we protest, was based "upon the *dutiable* value of the merchandise, decided by the appraiser and reported by him to the collector." (Rec. 1, fol. 2, § 3.) The case adds:—"In estimating and appraising the actual market value," etc.,—"the appraiser decided that the *dutiable* value of such merchandise equalled the sum of the net invoice value and the German duty added together, and reported to the collector this decision as to the *dutiable* value of the merchandise appraised."

*(Id.*, 2, fol. 3, § 9.*)* The next following paragraph (10) repeats this statement. *(Ib.* § 10.*)*

We have quoted *(ante*, p. 12*)* the Board's language, that nothing in the appraisers' returns "indicates that these officers professed to ascertain the market-value of the goods, *per se*, to be more than the value specified in the invoice", etc.

The difference between the market-value, which the appraisers are to ascertain, and the dutiable value, upon which the collector is to base his assessment, is as clearly indicated in the act of 1823, first creating appraisers, as it is in the administrative act of 1890. The fifth section, act of 1823, requires that "to the appraised value, if appraised" shall be added all charges, except insurance, plus 20%, as the basis of duty. (3 Stats. 732-3.) This act only required an appraisement at the collector's option *(Id.* 730 top*)* but the act of 1828 made it imperative, in terms substantially as repeated in later legislation; saying that "to the value of said goods, so ascertained" there is to be added charges, etc.; "and the said *ad valorem* rates shall be estimated on said aggregate amount," etc. (4 Stats. 274.)

It is unnecessary to follow the statutes down; but R. S. sec. 2902 is seen to require the appraising officers "to ascertain, estimate and appraise the true and actual market value," etc., at the time of exportation, and in the principal markets, etc.; while R. S. sec. 2907 requires that "In determining the *dutiable* value of merchandise, there shall be added to the cost, or to the actual wholesale price, or general market-value," certain specified items.

*Wilson v. Maxwell, 2 Blatc., 321.*
Sampson v. Peaslee, 20 How. 575-6.

The existing law, act of June 10, 1890, § 10, prescribes the appraisers' duty in similar, if not identical, language. The nineteenth section, as hereinbefore mentioned *(ante*, p. 8*)* requires duly to be assessed

upon the market value of the goods, "in the condition in which such merchandise is there bought and sold for exportation to the United States." In that condition it may be worth more or less than in any other. The transcript in the Oberteuffer case (# 1192, Oct. Tr., 1885) shows that the goods there mentioned were exported to the United States in a different condition from that in which they were shipped to other North-American countries.

Chief-Justice APPLETON observed: "The ice, besides its value in use, had value *as an article of merchandise for exportation.*" (68 Me. 462.)

He quotes this from 1 Wharton on Evi. § 449;—"Value, it must be remembered, consists in the estimate, or opinion, of those influencing the market, attachable to certain *intrinsic qualities* belonging to the article to be valued."

Washington v. Webster, 68 Me., 463.

It is because of the possession of these intrinsic qualities that the importer buys the article abroad and through these he expects to sell them here. A tax, collectible only in case the article is consumed within the imperial boundaries, is not an intrinsic quality. Whatever the domestic German consumer pays is partly tax and partly on account of inherent qualities. He is, to a certain extent, a trammeled purchaser. The price at which the goods are "*freely* offered to all the world" (3 Wall. 125) is that attaching to their intrinsic qualities only.

For thirty years or more, "actual cost" to the individual importer was the basis of duty-assessment. The act of June 30, 1842, c. 270, § 16 (5 Stats. 563) is the first to require the appraisement of "the actual market value, or wholesale price . . in the principal markets of the country," etc. Here, the "actual market value" and "wholesale price" are synonymous; for the value in any market must be indicated by the

prices actually paid in wholesale dealings in that market.

Meixell v. Kirkpatrick, 29 Kans. 679.
Murray v. Stanton, 99 Mass., 348.

The idea that value depends upon intrinsic qualities is sometimes conveyed by reference to the "available uses" for which these qualities fit the property.

Low vs. R. R. 63 N. H. 558.
Esch vs. C., M. & St. P. 72 Wis. 231-2.

The language of tariffs is addressed to our own people, and especially to those engaged in commercial transactions, for their guidance in carrying on business.

"Tariff acts, as the Supreme Court has repeatedly held, are concerned with trade and commerce. They are presumed to be framed after a careful examination of commercial conditions, and are to be construed in the light which a knowledge of those conditions affords.

U. S. vs. Blumlein, 14 U. S. Ap. 107.
Same vs. Herrmann, *Ibid.* 416.

Language, especially denominations—nevertheless, *all* language—of tariffs is used according to commercial understanding.

U. S. vs. 112 Casks, 8 Pet. 279.
Elliott vs. Swartwout, 10 *Id.* 151,
and cases *passim.*

"Especially should this view prevail as to laws made for the government of the importer. His business is regulated by them; and it is but reasonable that, like the language of marine policies, and the terms of the law merchant, supposed to be especially applicable to this class, these laws should be construed as universally understood by the importer and trader." Arthur vs. Morrison, 96 U. S. 110.

As heretofore noted, the judicial construction of the law as to foreign market value, in cases like the present, acquiesced in by the Treasury Department, for many

years, has been that given it by the Board of General Appraisers and the Circuit Court, for which we now contend.

## IV.

### Cases cited by government below.

Taking these cases chronologically, it will be found that, *upon their facts*, they do not sustain the government's contention here; but the opinions expressly discriminate the cases presented from those having facts such as exist in the present case.

Hilton v. Merritt, 110 U. S. 97, was decided January 14, 1884. The plaintiffs' *only* complaint in that case was that the General Appraiser and the Collector set too high a value upon the goods *per se;* on the *admitted* constituents of value—those inherent qualities that gave value to the goods everywhere;—*not* that any item was unlawfully added to the ascertained, to make an artificial *dutiable*, value. The opinion thereupon concluded;—

"We are of opinion, *therefore*, that the valuation made by the customs officers was not open to question in an action at law, as long as the officers acted without fraud, and within the power conferred on them by the statute." (110 U. S. 106 bottom.)

Auffmordt v. Hedden, 137 U. S. 310, was decided Dec. 8, 1890. Like the Hilton case, the protest was simply a denial of the correctness of the appraised market-value; asserting it attached too high a value to the goods *per se*. The decision merely reiterates, that an appraisement of the lawful market-value is conclusive, where the appraisers, "in appraising, act within the scope of the powers conferred upon them." (137 U. S. 324 bottom.)

Referring to Hilton v. Merritt, the Auffmordt opinion states that the evidence there ruled out "was evidence

that tended *only* to show carelessness or irregularity in the discharge of their duties by the appraisers, but not that they had assumed powers not conferred by statute." (137 U. S. 325 middle.)

Comparing the cases cited by plaintiff in the Auffmordt case with that case, the Auffmordt Opinion notes that the cited cases were (and Auffmordt's was not) " where to the admitted market value of an importation there was *added* such additional value as was equal to a reduction made in the valuation of the cases containing the goods, as in Badger vs. Cusimano, 130 U. S., 39. Those were instances of errors outside the valuation itself, and outside of the appraisement required by statute " (137 U. S., 328, bottom.) Yet, in Badger vs. Cusimano, the form of the appraiser's return was to state an increased dutiable value, above that of the invoice ; but the Court ascertained how the increase was made, and declared the method adopted illegal—in that it included what it should not have included.

In the Oberteuffer case, reference to the transcript, and to the opinion of the Circuit Court (24 F. R., 852) shows that the cost of boxes, etc., was claimed (and held by that Court) to be part of market value, the appraiser's report being ' add to make market value in marketable condition.' This Court held, however, that a protest, and not a reappraisement, was the proper remedy, the report being matter of form, the real question one of legality (116 U. S., 515-6).

Earnshaw v. U. S. 146 U. S. 60, again rules that an appraisement is conclusive, " when properly conducted ;" otherwise, otherwise. Whether it *is* ' properly conducted ' or not is a judicial question ; necessarily to be determined by inquiring and ascertaining what its conduct was. The Earnshaw opinion prosecutes such an inquiry, and finds no impropriety ; but such procedure and finding implies the right and power, and the duty, to find the other way, wherever the facts require. It assumes the right and necessity of such an examination by the Court into the proceedings whenever they

are protested against as fraudulent, illegal, or improperly conducted;—*not* when the merchant simply asserts that the duly-ascertained market-value is put too high.

In Badger v. Cusimano, the *form* was, that the appraiser reported an increased market-value; the *fact*, that the collector caused the inclusion of a non-dutiable item. "He did what the law did not authorize him to do, namely, increased the *dutiable* value of the oranges, although they were invoiced and entered at their true *market*-value." (130 U. S. 42; also, 43.) The same is stated to be the case in Robertson v. Frank Bros. 132 U. S. 26.

As viewed by this Court, the Passavant case (148 U. S. 214) was simply another instance of an attempt to review judicially a *re-appraisement by the Board* had under the thirteenth section of the act of June 10, 1890, called for by the importers upon the ground that the valuation of the goods *per se* was too high; not that the dutiable value was illegally computed and declared. The Court considered all claim upon this latter ground "abandoned" (148 U. S. 216).

Shoenfeld v. Hendricks, 152 U. S. 691, simply held that the repeal of Rev. Stats. sec. 3011 precluded the maintenance of any suit *against the collector* for his action in the assessment of duty.

In U. S. v. Klingenberg, 153 U. S. 101, 103–4, the *defendant in error* contended the judicial review of the Board's action under sections 14 and 15, act of June 10, 1890, was confined exclusively to the subject of rate and classification; which is the position assumed now in this case, or which was taken in the courts below. This Court, in the Klingenberg case, said "not so." The opinion italicized the statement that it is the collector's decision "as to the rate and *amount* of duties, including all dutiable costs and charges" that can be reviewed on protest under section 14 (153 U. S., 101), adding: "This section clearly allows and provides for an appeal by the importer from the decision of the collector as to *both* rate and amount of duties," etc. (*Ibid.*, 101, bottom).

Touching this very claim, made by the U. S. Attorney in the present case below, this Court, in the last-cited case, upon the last page of its opinion, observed:

"Under a proper construction of sections 14 and 15 of the act of June 10, 1890, it cannot be held that the right of review by the Circuit Court is limited and confined, as contended by the appellee, to the two subjects of classification and rate of duty" (*Ibid.*, 104).

In U. S. vs. Jahn, 155 U. S. 109, 117, the same point was affirmed by a mere reference to the Klingenberg case, as decisive of it.

Erhardt v. Schroeder, 155 U. S. 130, middle, states the position for which we here contend.

The first paragraph of the syllabus in Origet v. Hedden, 155 U. S. 228—and the opinion, p. 235 top—states the law just as Judge CURTIS did in Burgess v. Converse, 2 Curt. 220.

And in Muser v. Magone, at page 247 of Vol. 155 U. S. Rep., the Chief-Justice states that an appraisement is open to judicial attack where illegal items have been added independently of the real market-value of the goods.

In the present instance, the law of the land, as laid down by the Courts, acquiesced in by the Treasury Department, was that the German duty was not dutiable; yet the collector so instructed the appraiser that he disregarded this law.

We have referred to these cases, which were cited below, upon the assumption they will be again cited here; not having yet been favored with the appellant's brief, and the appearance of this case upon the day-call prior to the Thanksgiving recess forbidding further delay in printing this brief.

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# APPENDIX.

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*United States vs. Passavant & Co.*

WHEELER, J.

These goods were subject to an import duty in Germany if for consumption, and were free of it if for exportation. The appraiser added the amount of that duty to the wholesale price of the goods in that country in ascertaining the dutiable value here; and the Board of General Appraisers did not. Question is made whether this is a proper mode of raising the question as to the addition of that duty; but according to the answer of the Supreme Court to the question of the Circuit Court of Appeals in United States vs. Jahn & Co., Nov. 5, 1894, it seems so to be. [155 U. S. 109.]

Section 19 of the Customs Administrative Act provides specifically that the dutiable value shall be the wholesale price of such merchandise as bought and sold in the principal markets of that country, in the same condition, including coverings, "and all other costs, charges and expenses incident to placing the merchandise in condition packed ready for shipment" (26 Stat., 139). This German duty was never paid, and never became or could become any cost, charge or expense incident to placing the merchandise in condition for shipment. The statute provides for adding charges incident to the exportation, but not for those which would only have been incident to doing something else with the goods (United States vs. Leigh, 39 Fed. Rep., 764).

Judgment affirmed.

No. 129.

C. G. Burgoyne's Printing Business, 146-150 Centre

Reply Brf. of Smith & Co

Filed Nov. 29, 1897.

# UNITED STATES SUPREME COURT.

OCTOBER TERM, 1897

| | |
|---|---|
| UNITED STATES, appellant, v. PASSAVANT & CO. | No. 129. |

## Appellees' Notes of Reply.

The Solicitor-General having kindly favored us with a copy of his brief, received after ours was printed, it may assist the Court if we call attention to matters wherein we agree, and may define the issue more clearly to file some brief notes upon his argument.

It is a mistake (His brief, p. 4, middle) to say there was no attempt to review the decision of the collector as to the "*amount* of duties chargeable upon the imported merchandise."

Klingenberg's case italicizes the declaration that section 14 confers the right of judicial review of the collector's decision "as to *both* rate and amount of duties," as distinguished from each other. (153 U. S. 101 bottom.)

If the appraiser's mental operations cannot be investigated, his report resulting therefrom can be read, and its statements taken as the ground of his and of the collector's action.

Upon the fifth page of his brief, the Solicitor-General states the fact which our brief emphasizes, viz; That, under the tenth section, Act of June 10, 1890, "The appraiser ascertains the actual market value and wholesale price of the merchandise in the principal markets of the country whence imported." It is *only* this appraisement of *market*-value—*when conducted in conformity with law*—that is final, unless changed upon re-appraisement under Section 13.

In the present case the Board stated that the appraiser's returns indicated no increase, above the invoice, of the value of the goods *per se*, but only an addition for dutiable purposes, simply giving a construction to the invoice.

Section 13 makes the decision of the appraiser final, except upon reappraisement, only " in cases where no objection is made thereto " by either party. This section must contemplate either a *legal* objection to the conduct of the appraisal, or dissatisfaction with its judgment as matter of fact; all legal questions to be settled under section 14, and errors of fact under section 13.

At the commencement of the statute quoted upon page 6 of the government brief, the words " invoice and entry " are the nominatives of " include and specify." *These papers* are to state the actual cost of the goods, *per se*, and *also* the specified costs and charges. Such has been the requirement of previous statutes, whenever such items were dutiable. Ex gr., R. S. sec. 2907 and Gen. Regs. under the same; also oaths under R. S. sec. 2841. Moiety Act, sec. 14; 18 Stats. 189. Act of March 1, 1823; 3 Stats. 731. See 116 U. S. 507-8, and 513. In the act of 1883, some specification of charges, etc., were required, though non-dutiable under that act.

In the case there reported (116 U. S., 499) we emphasized the statement now here repeated; that Congress has never made " charges," etc., the subject of appraisement—" never, from July 4, 1789, to this day."

The market-value is appraised, as by Act of June 10, 1890, § 10; to which the items mentioned are added, to fix the amount upon which duty is assessed.

The whole course of legislation and practice, reviewed in our Oberteuffer brief, and which we have not time now again to produce here, shows the error of the Solicitor-General in contending (page 7) that "coverings," etc., are any part of the value of the merchandise, to be appraised. Many opinions of this Court speak of the value of the goods *per se*, the subject of appraisement, as distinguished from the dutiable value, which includes charges, etc.

The Solicitor-General's error is refuted by section 14, Act of 1890, which makes the Collector's decision as to "all dutiable costs and charges" the subject of judicial review upon protest.

We have no quarrel with the definition of actual market value upon page 7 of the government brief;—the issue here is as to the application of it. We say our invoice stated just that wholesale price at which the goods were freely offered to all purchasers at the time of exportation.

Section 19 observes the distinction always made from July 4, 1789 down. Section 10 relates to what shall be *appraised*—the *market* value. Sec. 19 relates to what shall be *assessed*—the *dutiable* value. And as this is a decision of the collector, it is made subject of protest, under sec. 14. The *appraiser* has no statutory duty to perform regarding *dutiable* value.

In our brief we have already considered the cases mentioned by the Solicitor General in the rest of the first division of his brief, pp. 11 to 14. Upon the last-named page, the brief says, "The German duty was not treated as a dutiable cost or charge; it could not be so treated, *for it was not paid*" (so italicized). "The market value was not ascertained, and the German duty added as a separate and independent charge."

We say it *was* so treated, though not paid. It was so "added." The record so states, at p. 2, fol. 3, item 10.

It also expressly negatives the idea of 'special advantages,' declaring the purchase we made was free to all the world, wishing to export.

Without again reviewing the government's citations we will say (1.) that the French drawback *was* paid, though refunded upon exportation, so that sum did actually attach to the goods, at one time, in France, while our German duty never did; and (2) that the Treasury Department does *not* now include the French drawback as an element of valuation, having voluntarily retired from that position.

As to the question of a market-value in bond, if these importers are mistaken so were Judges BLODGETT and COLT, and the Treas. Dept. that, for twenty years, acted in conformity with their decisions.

In reference to Judge WHEELER'S opinion, we say he states the exact fact, as shown by the record;—"The appraiser *added* the amount of that [German] duty to *the wholesale price* of the goods in that country, in ascertaining the *dutiable* value here". The Solicitor General thinks that *cannot* be, because that duty was never paid. That is just the ground of our complaint. Like the prisoner told he could not be incarcerated for doing a certain act, "Nevertheless that is what I am here for." We note Judge WHEELER'S suggestion that the enumeration of those charges incident to exportation as to be added, excludes all others—especially which were not so incident. *Expressio, etc.*

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Of counsel for appellees.

# UNITED STATES *v.* PASSAVANT.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 129. Argued December 1, 1897. — Decided January 3, 1898.

In proceedings brought before the board of general appraisers by protests under § 14 of the Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 131, to review decisions of a collector of customs upon entries, the board has jurisdiction to inquire into and impeach the dutiable valuation reported to the collector by the appraiser upon which the collector assessed the rate of duty to which the merchandise was subject.

The "German duty," which is a tax imposed by the German Government on merchandise when sold by manufacturers for consumption or sale in the markets of Germany, but is remitted by that Government when the goods are purchased in bond or consigned while in bond for exportation to a foreign country, was lawfully included by the appraiser in his estimate of the dutiable value of the importation in question in this case.

THIS case came to this court on the following certificate from the United States Circuit Court of Appeals for the Second Circuit:

"A judgment or decree of the Circuit Court of the United States for the Southern District of New York having been made and entered on the 30th day of January, 1895, by which it was ordered, adjudged and decreed that there is no error in certain proceedings before the board of United States general appraisers in this cause, and that their decision therein be, and the same hereby is, in all things affirmed; and an appeal having been taken from said judgment or decree to this court by the above-named appellants, and the cause having come on for hearing and argument in this court, certain questions of law arose concerning which this court desires the instructions of the Supreme Court of the United States for the proper decision of said cause.

"The facts from which said questions arise are herewith submitted and certified as follows:

"1. Certain merchandise, consisting of cotton velvets, was imported from the empire of Germany into the port of New

York by the appellees in various steamers between May 22, 1891, and March 13, 1892, and was entered at the custom house and appraised by the appraiser.

"2. The merchandise was originally imported into Germany in the gray, and was subjected to processes of dyeing and finishing, and was put in bond in that country.

"3. The collector classified the merchandise for duty under paragraph 350 of the tariff act of October 1, 1890, at 20 per centum ad valorem and 14 cents per square yard, and assessed the said rates of duty upon the dutiable value of the merchandise decided by the appraiser and reported by him to the collector.

"4. The merchandise was of a description provided for *eo nomine* in said paragraph 350, and was properly classified for duty under that section.

"5. The invoices stated certain prices as the net invoice value of this merchandise. The invoices stated also certain additional sums, under the heading 'German duty.'

"6. This German duty is a tax which is imposed by the German Government on the merchandise when it is sold by the manufacturers thereof for consumption or sale in the markets of Germany, but when the merchandise is purchased in bond, or consigned while in bond, for exportation to a foreign country, this duty is remitted by the German Government, and is called 'bonification of tax,' as distinguished from being refunded as a rebate.

"7. This German duty or tax is the amount of the duty levied by the German tariff upon the goods when consumed in Germany. It is collected when the finished product goes into consumption in Germany, but is remitted when the finished product is sold in bond for exportation.

"8. The merchandise can be purchased in bond for exportation in the principal markets of Germany at the net invoice prices and without paying the so-called German duty. The merchandise involved in this action was so purchased for exportation.

"9. In estimating and appraising the actual market value and wholesale price of such merchandise at the time of ex-

portation to the United States in the principal markets of the country from whence imported, the appraiser decided that the dutiable value of such merchandise equalled the sum of the net invoice value and the German duty added together, and reported to the collector this decision as to the dutiable value of the merchandise appraised.

"10. In estimating this dutiable value the local appraiser added as an element of dutiable value to the net invoice value these amounts specified in the invoices and entries under the name of 'German duty.' Such amounts have been included by the importers in their entries under duress, to avoid threatened penalties under the law.

"11. The importers did not call for any reappraisement of the merchandise, but within ten days after the liquidation by the collector of each entry, and the assessment by him of the rates of duty aforesaid upon the dutiable valuation so reported to him by the appraiser, filed protests under section 14 of the act of June 10, 1890, against the decisions of the collector, of which the following protest is one, to which the others are similar:

[Here followed the protest.]

"12. The board of United States general appraisers, acting upon said protests, reversed the decisions of the collector on the ground that the so-called German duty was not a lawful element of dutiable value.

"13. Thereupon the collector applied to the Circuit Court of the United States for the Southern District of New York by petition praying for review of said decision by the board, pursuant to section 15 of the act of June 10, 1890, and the said Circuit Court upon said petition ordered the board of United States general appraisers to return to the Circuit Court the record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decision thereon, and the said board of general appraisers thereafter made such return; and the Circuit Court affirmed the decision of the board as aforesaid.

"14. It is admitted that Frederick S. Passavant, Karl Kotzenberg, William Sandhagen, Heinrich Meyer, Arthur W.

Watson and Oscar Passavant, the importers, are the persons composing the firm of Passavant & Company.

"Upon the foregoing facts this court, for the proper decision of said cause, desires instruction upon the questions of law following:

"(1) In proceedings brought before the board of general appraisers by protests, under section fourteen (14) of the act of June 10, 1890, to review the collector's decisions upon the entries in this case, had the board jurisdiction to inquire into and impeach the dutiable valuation so reported to the collector by the appraiser, as above stated, and upon which the collector assessed the rate of duty to which the merchandise was lawfully subject?

"(2) If the first question is answered in the affirmative, was the 'German duty' lawfully included by the appraiser in his estimate of dutiable value?"

*Mr. Solicitor General* for the United States.

*Mr. Edwin B. Smith* for Passavant.

Mr. Chief Justice Fuller, after stating the case as above, delivered the opinion of the court.

The thirteenth section of the Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 131, relates solely to the appraisement of imported merchandise, and declares that the decision of the board of general appraisers, when invoked as provided, "shall be final and conclusive as to the dutiable value of such merchandise," and directs the collector to ascertain, fix and liquidate the rate and amount of duties to be paid on such merchandise, and the dutiable costs and charges thereon.

Section 14 provides that the decision of the collector as to the "rate and amount of duties, . . . including all dutiable costs and charges, and as to all fees and exactions of whatever character, except duties on tonnage, shall be final and conclusive," unless the importer protests and appeals to

the board of general appraisers. This section clearly allows and provides for an appeal by the importer from the decision of the collector, as to both rate and amount of duties, as well as dutiable costs and charges, and as to all fees and exactions.

By section 15 it is provided that "if the importer, . . . or the collector . . . shall be dissatisfied with the decision of the board of general appraisers, as provided for in section 14 of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they or either of them, may . . . apply to the Circuit Court . . . for review of the questions of law and fact involved in such decision."

In *United States* v. *Klingenberg*, 153 U. S. 93, 102, it was said by Mr. Justice Jackson, speaking for the court: "The right of review by the Circuit Court is coextensive with the right of appeal to the board, as to all matters except the dutiable value of the imported merchandise, as to which the decision of the board of general appraisers is by section 13 made conclusive. Now, by section 14 of the act, if the decision of the collector imposes an excessive amount of duties, under an improper construction of the law, the importer may take an appeal to the board of general appraisers, whose decision on such questions is not made conclusive as it is in respect of the dutiable value of the merchandise, and not being conclusive, it is subject to review under the express provisions of section 15."

The purpose of section 13 is to afford the importer or collector the right to call for a reappraisement by a general appraiser or a board of general appraisers, to review the decision of the local appraiser or a general appraiser as to the correct amount of the dutiable value of the merchandise, and is distinct and separate from the remedy by protest.

Under section 7 the collector is to determine for himself the question of what is the invoice value of the goods, and, in doing this, he may add such charges as he considers to be dutiable, but his decision in this respect is not in the nature of an appraisement, and may be attacked by protest. And

while the general rule is that the valuation is conclusive upon all parties, nevertheless the appraisement is subject to be impeached where the appraiser or collector has proceeded on a wrong principle contrary to law or has transcended the powers conferred by statute. *Oberteuffer* v. *Robertson*, 116 U. S. 499; *Badger* v. *Cusimano*, 130 U. S. 39; *Robertson* v. *Frank Brothers Company*, 132 U. S. 17; *Erhardt* v. *Schroeder*, 155 U. S. 124; *Muser* v. *Magone*, 155 U. S. 240.

These decisions were made under prior similar legislation as to the finality of the appraisement, and when an action against the collector was provided by section 3011 of the Revised Statutes as the remedy for an illegal exaction of duties. Section 3011 was repealed by the act of June 10, 1890, and in *Schoenfeld* v. *Hendricks*, 152 U. S. 691, it was held that such an action could not be maintained, as it was not authorized by statute, and would not lie at common law because the money was required to be paid into the Treasury by section 3010; so that the importers were remitted to the remedies provided in the latter act. Whether the dutiable value in this case was erroneously increased by the unauthorized addition of an independent item to the market value, as asserted by the importers, was a question of law, and properly carried to the board of general appraisers by protest and appeal.

We think that section 14 furnishes the means of redress for illegal action, and that the board of general appraisers has the same power under this section to inquire into the legality of an assessment as it has under section 13 to see whether or not the valuation is excessive or insufficient through an error of judgment.

The first question must, therefore, be answered in the affirmative.

By section 19 of the act it is provided "that whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities, at the time of

exportation to the United States, in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale, including the value of all cartons, cases, crates, boxes, sacks and coverings of any kind, and all other costs, charges and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, . . ."

By section 10 it is made the duty of the appraisers "by all reasonable ways and means in his or their power to ascertain, estimate and appraise (any invoice or affidavit thereto or statement of cost or of cost of production to the contrary notwithstanding) the actual market value and wholesale price of the merchandise at the time of exportation to the United States, in the principal markets of the country whence the same has been imported, and the number of yards, parcels or quantities, and actual market value or wholesale price of every of them, as the case may require."

Was the action of the appraiser lawful in treating the so-called German duty as an element of value in determining the actual market value or wholesale price of these cotton velvets, at the time of exportation, in the principal markets of Germany?

What was to be ascertained was the actual market value or wholesale price of the merchandise as bought and sold in usual wholesale quantities at the time of exportation, in the principal markets of the country from whence imported. This market value or price was the price in Germany and not the price after leaving that country, and the act does not contemplate two prices or two market values.

The certificate of facts states that the German duty is imposed on merchandise when "sold by the manufacturers thereof for consumption or sale in the markets of Germany;" and "is collected when the finished product goes into consumption in Germany." As the tax accrues when the manufacturer sells, his wholesale price includes it, and the purchaser who buys these cotton velvets in wholesale quantities in the German markets pays a price covering the tax,

and that is the price for the merchandise when bought and sold in those markets.

Doubtless, to encourage exportation and the introduction of German goods into other markets, the German Government could remit or refund the tax, pay a bonus, or allow a drawback.

And it is found that in respect of these goods when "purchased in bond, or consigned while in bond, for exportation to a foreign country, this duty is remitted by the German Government, and is called 'bonification of tax,' as distinguished from being refunded as a rebate." The use of the word "bonification" does not change the character of this remission. It is a special advantage extended by government in aid of manufactures and trade, having the same effect as a bonus or drawback. To use one of the definitions of drawback, it is "a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all."

But the laws of this country in the assessment of duties proceed upon the market value in the exporting country and not upon that market value less such remission or amelioration as that country chooses to allow in accordance with its own views of public policy.

*Muser* v. *Magone*, 155 U. S. 240, is quite in point. In that case the appraisement was attacked on the ground that certain items or elements of value had been illegally added to and included in the dutiable value. The imported goods were cotton embroideries. The cloth was purchased in the gray by the importers at Manchester; sent to St. Gall, Switzerland, where the embroideries were finished; and thence exported to the United States. The importers owned the plant at St. Gall. The entered value of the goods was raised by the appraisers, and the importers protested for the reasons that commissions and non-dutiable charges had been illegally included in the market value; that the goods should have been appraised at their actual market value when in the gray, adding the cost of finishing and laundering them; and on other grounds; the protest being particularly directed to the

alleged illegality of the valuation because one of the constituent elements of the value as found was illegally included. The appraisement was held conclusive in the absence of fraud, and this court, among other things, said:

"The question was not whether through the special advantages which Muser Brothers enjoyed, the actual cost to them may have been less than what was decided to be the actual dutiable value of their goods, for the latter was determined by the general market value and wholesale price of all goods of the same description. . . .

"The issue made by the protest was that the valuation was illegal because including certain specified incidental expenses, (one or more of them,) as for designs, salary of buyer, clerk hire, rent, interest and percentage on aggregate cost. Upon the theory of an ascertainable market value at St. Gall, these were matters to be considered and in a sense included, but not in the sense of substantive items independent of market value, added thereto to make dutiable value. . . . The course of business at St. Gall in respect of these embroideries was peculiar, and to reach a result, in estimating the value, required the consideration of many elements making up the amount which actually represented the pecuniary basis of transactions. How these various elements impressed the general appraiser, and what grounds influenced or controlled his mental processes, were matters in respect of which he could not be interrogated, since his decision, when approved by the collector, was final and could not be reviewed and the verdict of a jury substituted. . . . The adjudication was of true market value, and did not consist in taking market value and adding the cost and charges specified in section 2907 in order to get at dutiable value." *United States* v. *Kenworthy*, 28 U. S. App. 450.

As the question in this case was what was the general market value and wholesale price of cotton velvets, as bought and sold in the principal markets of Germany, the fact that the German duty was not in fact paid on such goods when exported is immaterial. Exoneration from its payment was a mere special advantage extended by the German Govern-

ment, as we have said, in promotion of manufactures and commerce. The appraiser found, as matter of fact, that the market value in Germany was equal to the invoice price plus the home duty, but he did not therefore include that item as a substantive item independent of the market value, and add it thereto to make dutiable value, though in ascertaining the market value in Germany he properly recognized the fact that that duty formed part of the purchase price in the markets of that country.

The second question must also be answered in the affirmative.

*The answers indicated above will be so certified.*

MR. JUSTICE BROWN, with whom concurred MR. JUSTICE PECKHAM, dissenting.

I concur in the opinion of the court that the first question requires an affirmative answer, but I think that the second question should be answered in the negative. In estimating the dutiable value of goods the collector added to the net invoice value what is known as the German duty, which was never paid, and which formed no part of the "market value or wholesale price" of these goods. It does not appear what proportion of this class of goods was imported into Germany for exportation, as distinguished from those imported for consumption, but it clearly appears that there were two entirely distinct and separate prices: one of which was paid for the goods for exportation, and the other for consumption. It seems a great hardship that the defendants, Passavant & Company, should be charged with a price which they did not pay and which was no part of the value of the goods as they were purchased by them in Germany. If there be, in fact, two wholesale prices for these goods in the same markets, I know of no reason why the collector should not recognize this fact and charge the importer with that one of the wholesale prices which he actually paid, and for which others under the same circumstances could obtain the goods.

The construction given to the statute by the court is unneces-

sary, and the effect is to increase the cost of the article to the consumer by adding to the price the amount of a tax in fact not paid by the importer. For aught that appears in this record, the sales for exportation may have been ten times as great as those for domestic consumption, and we do not understand why the prices realized in the latter sales should be arbitrarily selected by the Government as the actual market value or wholesale price of the articles.